

FEDERAL MOTOR VEHICLE SAFETY LEGISLATION

In 1966 the first federal legislation was passed affecting newly manufactured motor vehicles.¹ This comment will review some of the reasons for this legislation, its basic provisions, and its present effectiveness.

I. HISTORY

The first auto accident was reported in 1897.² Legal writers were expressing concern over automobile accident consequences as early as 1919.³ As the number of motor vehicles in the United States grew to 91,000, the number of annual accidents increased steadily. From 1900 to 1964 over 1,500,000 Americans died in motor vehicle accidents, greatly exceeding the number of combat deaths in all wars.⁴ In 1965 alone some 49,000 lost their lives in such accidents, while some three million were injured, ninety percent of them requiring medical attention, with one in every four being hospitalized. Direct economic loss totalled 8,500,000,000 dollars.⁵ Some state or federal action had to be taken to prevent the prediction of seventy thousand motor vehicle deaths for 1975⁶ from becoming a reality.

While federal regulations have governed various safety aspects of air, railway and marine transportation systems,⁷ the responsibility for highway safety, with the exception of the Interstate Commerce Commission's regulation of a limited number of

¹ National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 STAT. 718, 15 U.S.C. §§ 1281-1425 (Supp. 1965-66).

² See *Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. [hereinafter referred to as *Hearings on H.R. 13228*], pt. 1, at 63 (1966).

³ E.g., Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919).

⁴ From 1900 through 1964 motor vehicles accounted for 1,510,000 deaths, while wars accounted for 605,000 deaths from 1775 through 1964. See 112 CONG. REC. 1841 (1966).

⁵ *Hearings on the Federal Role in Traffic Safety Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations*, 89th Cong., 2d Sess. [hereinafter referred to as *Hearings on the Federal Role in Traffic Safety*], pt. 3, at 1105 (1966).

⁶ *Hearings on H.R. 13228*, pt. 1 at 63.

⁷ See generally, JOHN GUANDOLO, *TRANSPORTATION LAW* (1966); FREDERICK ARZT, *MARINE LAWS, NAVIGATION AND SAFETY* (1953).

trucks,⁸ has been left to the states. In the past each state has had a motor vehicle code setting forth specific traffic laws and penalties for their violation.⁹ Many states also have laws regarding motor vehicle equipment, such as brakes, lighting equipment, tires, or safety glass.¹⁰ Yet often these provisions are very general in nature,¹¹ apply out-of-date standards,¹² and may not even be complied with, since more than half of the states have no motor vehicle inspection laws.¹³ In such states, unless an infraction of equipment

⁸ Under 49 U.S.C. § 302 (1964) the Interstate Commerce Commission has the duty to regulate common and contract carriers by motor vehicle, and under 49 U.S.C. § 304 (1964) it may also establish reasonable requirements with respect to service and safety of operation and equipment for private carriers. However, carriers engaged in strictly intrastate operations are exempted. Currently out of a total of 15 million trucks only some two million are under the Commissions jurisdiction. *See Hearings on H.R. 13228*, pt. 1 at 599.

⁹ *See, e.g.*, OHIO REV. CODE ANN. §§ 4511.01-.99 (Page 1964), dealing with traffic control devices, speed regulations, traffic rules, right of way, pedestrians, parking, etc.

¹⁰ *See, e.g.*, OHIO REV. CODE ANN. §§ 4513.01-.99 (Page 1964); CAL. VEHICLE CODE §§ 24002-27302.

¹¹ *See, e.g.*, OHIO REV. CODE ANN. § 4513.02 (Page 1964) which simply prohibits highway use for any vehicle which is in such unsafe condition as to endanger any person. OHIO REV. CODE ANN. § 4513.04 (Page 1964) provides that every motor vehicle must be equipped with at least two headlights, one near each side of the front of the motor vehicle. OHIO REV. CODE ANN. § 4513.20 (Page Supp. 1966) (A) requires every motor vehicle to be equipped with brakes "adequate to control the movement of and to stop and hold such . . . motor vehicle," while (B) requires that the brakes must be maintained in "good working order" and shall be so adjusted as to operate equally on the wheels on opposite sides of the vehicles. Interpretation of what is "adequate" or "in good working order" is left to the courts. *But see* PA. STAT. ANN. tit. 75 § 816(a) (Supp. 1966) which measures brake performance by a deceleration rate (rate measured in feet per second at which a vehicle is brought from a speed of 20 miles per hour) and stopping distance (distance within which a vehicle is brought from a speed of 20 miles per hour to a stop on a hard surface) according to the type of vehicle involved.

¹² *See, e.g.*, OHIO REV. CODE ANN. § 4513.26 (Page 1964) which requires safety glass in motor vehicles, safety glass being defined as any product composed of glass so manufactured, fabricated or treated as substantially to prevent shattering and flying of the glass when it is struck or broken. Yet today's concern is with the development of a windshield that will keep a person in the vehicle during an accident; much research has been done on windshields in recent years, and glass in 1966 cars is greatly improved. *See Hearings on S. 3005 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. [hereinafter referred to as *Hearings on S. 3005*], at 238 (1966).

¹³ *See Hearings on H.R. 13228*, pt. 1, at 221 (1966) for a listing of states with vehicle inspection programs.

standard laws is easily observable, such as a burnt out light or faulty muffler, it may not be discovered until an accident occurs. Even though state inspection laws often exempt out-of-state vehicles,¹⁴ some reports indicate that nearly fifty percent of examined vehicles fail to pass the inspection requirements.¹⁵ Most of the state law enforcement has concentrated on the drivers' observance of traffic regulations.¹⁶ Similarly, the courts have dealt with accident consequences mostly on the basis of the drivers' fault. Only recently has there been a realization that accidents may be caused by mechanical defects in the vehicle and that manufacturers should be held responsible for losses due to defective manufacture, or possibly even defective design, of motor vehicles or equipment.¹⁷ At the same time, a few state legislatures have taken steps to improve auto safety in their states, either through establishment of motor vehicle safety research facilities¹⁸ or revision of laws regulating motor vehicle equipment.¹⁹

The federal government first took an active interest in traffic accidents in 1924 when the first National Conference on Street and Highway Safety was called. In 1926, the Conference approved a model for a Uniform Vehicle Code, which though praised was never adopted by any state. At the request of the Congress in 1936, the Bureau of Public Roads made a comprehensive report regarding traffic safety, indicating inadequacy of statistics, research and uniformity of laws, and noting the need for skilled investigation. Again, nothing was done about the accident problem, though other conferences were called from time to

¹⁴ Pennsylvania, for example, provides that if a car is purchased outside and brought within the state, the owner has up to 48 hours to comply with inspection laws; obviously this would, in effect, create an exemption for most out-of-state travelers. See PA. STAT. ANN. tit. 75, § 834 (1960). See also Brenner, *Legal Requirements for the Equipment and Design of Private Motor Vehicles: State Action and National Problem*, 23 GEO. WASH. L. REV. 429 (1955).

¹⁵ See, e.g., *Hearings on 13228*, pt. 1, at 430 (statement by President of Insurance Institute for Highway Safety).

¹⁶ See *Hearings on H.R. 13228*, pt. 2, at 1313-19 (1966).

¹⁷ Philo, *Automobile Products Liability Litigation*, 4 DUQ. L. REV. 181, 182 (1966).

¹⁸ See, e.g., N.Y. VEHICLE AND TRAFFIC LAW § 216 which established an automotive-medical research division to do medical and engineering research in the field of motor vehicle safety.

¹⁹ See, e.g., CAL. VEHICLE CODE § 26508 (emergency stopping system); ILL. ANN. STAT. ch. 95 1/2, § 216 (Supp. Smith-Hurd 1967) (new tire regulations).

time.²⁰ In 1956 a special subcommittee of the House Interstate and Foreign Commerce Committee held hearings regarding highway safety. The Federal-Aid Highway Act of 1956 directed the Secretary of Commerce to make a comprehensive investigation of the entire subject of highway safety. In 1959 a bill was introduced in the House, H.R. 1341, requiring certain safety standards for government-purchased automobiles; no action was taken by the Senate. Basic arguments against the measure were that the industry could voluntarily build in safety features without being required to do so, that the cost to the government would be prohibitive, and that the government would have too much control over the design of automobiles. Finally the Eighty-eighth Congress adopted the Roberts Act²¹ giving authority to the General Service Administration to establish passenger vehicle safety standards for federal government vehicles.²² Subsequently, federal standards were issued covering certain required safety devices for government-purchased vehicles, such standards to become effective in September of 1966.²³ Laws were also enacted to allow the Secretary of Commerce to prescribe hydraulic brake fluid²⁴ and seat belt specifications.²⁵ Yet over the years Congress has indicated a belief that states should work out any necessary legislation affecting their own highways. Thus in 1957 the Beamer resolution²⁶ was passed allowing the states to enter into agreements or compacts for the establishment of traffic safety programs, including research into safe automobile and highway design. Unfortunately, because of organizational and financial problems, by 1966 the state compact had only completed standards for tires. It had yet to consider tire retreads and many other automobile or equipment features believed

²⁰ Apathy and failure of the public and public officials to act positively is based upon (a) ignorance of facts, (b) political powers preventing action, and (c) economic factors which underlie the failure. Unless the public demands action, officials are seldom moved. See Kelner, *Stop Murder by Motor*, reprinted in 12 CONG. REC. 1841, at 1848 (daily ed. Feb. 2, 1966).

²¹ 40 U.S.C. §§ 701-03 (1964).

²² For congressional history see *Hearings on H.R. 13228*, pt. 1, at 64; 22 CONG. Q. ALMANAC 268 (1966).

²³ See *Hearings on H.R. 13228*, pt. 1, at 628-67 for G.S.A. standards.

²⁴ Pub. L. No. 87-637, §§ 1-3, Sept. 5, 1962, 76 STAT. 437, *repealed* by Pub. L. No. 89-563, Title I, § 117(a), Sept. 9, 1966, 80 STAT. 727.

²⁵ Pub. L. No. 88-201, §§ 1-3, Dec. 13, 1963, 77 STAT. 361, *repealed* by Pub. L. No. 89-563, Title I, § 117(a), Sept. 9, 1966, 80 STAT. 727.

²⁶ H.R.J.RES. 221, adopted as Pub. L. No. 85-684, 72 STAT. 635 in 1958, *repealed* by Pub. L. 89-564, Title I, § 102(a), Sept. 9, 1966, 80 STAT. 734.

unsafe.²⁷ Obviously, the state compact could not be looked to for a quick research and comprehensive automobile standards in the near future. Even if standards were adopted by the state compact, they would still have to be enacted into law by the various state legislatures.²⁸

In 1965 the United States Senate began hearings regarding the federal role in traffic safety.²⁹ It found that governmental efforts had been small, disorganized and uncoordinated and that there was lack of data on traffic accidents.³⁰ One emerging idea seemed to be that traffic safety was dependent on four factors: the driver, the highway, the law, and the vehicle.³¹ Controversy existed regarding the importance of each factor. Drivers' error was claimed to be involved in most motor vehicle accidents.³² On the other hand, some argued that an important part of having safe vehicles was proper maintenance.³³ Manufacturers asserted they were safety-conscious in designing cars and were spending substantial amounts on safety.³⁴ But many researchers stated that vehicle design errors had contributed to pedestrian as well as passenger injuries and called for improvements in many areas.³⁵ As to the federal role, opinions varied. While some advocated active government participation,³⁶ others, while advocating use of federal funds for research and other purposes, either stressed the development of state standards and programs³⁷ or suggested that vehicle development should be

²⁷ Before any state could join the compact, it had to pass enabling legislation. Separate legislation was required for financing. New York was the first state to enter the compact in 1962; it was joined by 26 states in 1963, six in 1964 and 12 in 1965. The first organizational meeting was held in 1963. The first annual meeting of the Vehicle Equipment Safety Commission (consisting of representatives from the various states of the compact) was held in 1964. An office was opened and an executive director appointed only in 1966. For history of the interstate compact see *Hearings on H.R. 13228*, pt. 1, at 771.

²⁸ E.g., OHIO REV. CODE ANN. § 4513.52 (Page 1964), which provides that no rule, regulation, or code issued by the vehicle equipment safety commission is to take effect until approved and set forth in a law passed by act of the general assembly.

²⁹ See *Hearings on the Federal Role in Traffic Safety*, parts 1, 2, 3, and 4 (1966).

³⁰ See *id.*, pt. 3 at 1077.

³¹ *Id.* at pt. 2, 686-74 (statement by President of American Motors).

³² *Id.* at 868.

³³ *Id.* at 870, 979.

³⁴ *Id.* at 653-72, 870, 897-908.

³⁵ *Id.* at 1050-79, 934.

³⁶ *Id.* at 1288-98 (statement by Ralph Nader).

³⁷ *Id.* at 1109-11 (statement by National Safety Council).

left to the industry.³⁸

On March 2, 1966, President Johnson delivered to the Congress his Message on Transportation. He urged the establishment of a Department of Transportation to consolidate all federal agencies dealing with transportation promotion and safety, and the adoption of a highway safety program providing for increased federal grants to states for highway safety, improved automobile safety performance and federal highway safety research.³⁹ Subsequently, various bills were introduced into the House and Senate dealing with automobile safety, and many hearings were held. The major House bill, H.R. 13228, initially provided that the Secretary of Commerce should have discretion to issue safety standards if after two years he determined that existing standards were inadequate.⁴⁰ Opponents argued that inasmuch as the private industry had never issued and followed any voluntary standards in the past, further delay would simply put more millions of defectively designed cars or cars lacking requisite safety features on the road.⁴¹ Finally, even the automobile industry suggested immediate mandatory federal standards.⁴² The Senate bill, S. 3005, which became the National Traffic and Motor Vehicle Safety Act of 1966, calls for mandatory standard-setting by the Secretary of Commerce⁴³ not only for passenger automobiles but for all motor vehicles.⁴⁴

During the hearings on the bills many previously raised arguments were again heard. Undoubtedly the industry could voluntarily design and build safer motor vehicles and equipment. But in the past it had occasionally failed to do so, even when it was aware of potentially dangerous design features or had plans available for safer equipment.⁴⁵ Some safety features became part of the standard equipment on all vehicles after the General Service

³⁸ *Id.* at 914 (statement by Ford Motor Co.).

³⁹ *See Hearings on S. 3005*, at 2-12.

⁴⁰ *See Hearings on H.R. 13228*, at 3.

⁴¹ *Id.* at 555 (statement by Sen. Abraham Ribicoff).

⁴² *Id.* at 273.

⁴³ 15 U.S.C. § 1392 (1964).

⁴⁴ 15 U.S.C. § 1391 (1964).

⁴⁵ Since some of the existing research on vehicle safety had been industry-sponsored, the results were available to the industry. *See, e.g., Hearings on H.R. 13228*, 693-714 (statement by President of Cornell Aeronautical Laboratory and exhibits regarding past research, analysis of injury risk in vehicles by type of principal impact, and a list of research projects).

Administration requested such features for government vehicles.⁴⁶ The industry claimed that other devices were impossible to produce, yet they became available when legislation required them.⁴⁷

Thus the industry is seemingly capable of solving many problems once it decides to do so. Why has the industry been so hesitant? One of its arguments is that today's cars are safe.⁴⁸ Undoubtedly motor vehicles are safer today than thirty years ago.⁴⁹ But there is ample evidence that certain recent design features, such as fins or sharp ornaments on the outside of the vehicle, have proved dangerous to pedestrians.⁵⁰ Similarly, door locks and door hinges have been inadequate, resulting in passengers being thrown out of the vehicle during accidents, thus aggravating their injuries.⁵¹ There is also no doubt that protruding instrument knobs have been fatal⁵² and that safety glass has been safe only at low speeds.⁵³

As to past industry arguments that the public does not want safety,⁵⁴ they could only be applicable in regard to optional equipment. There have never been any statistics to show how many people would or would not have purchased optional safety features if they had been fully informed of their value.⁵⁵ Furthermore, it is questionable whether such a choice can properly be left to the individual when the presence or absence of some safety feature may

⁴⁶ 1966 automobiles sold by the "big four" included as standard equipment all but two of the 17 items which had been required by G.S.A. specifications on 1967 model cars purchased by the government. See 112 CONG. REC. 20600 (daily ed. Aug. 31, 1966).

⁴⁷ After California passed its Vehicle Code § 27156 requiring certified motor vehicle pollution control devices, the industry was able to produce such devices by the effective date of the statute. Also, in November of 1965 the industry stated that collapsible steering wheels could not be produced in the foreseeable future; yet three months later General Motors announced that such steering wheels would be standard equipment on 1967 models. See *Hearings on S. 3005*, at 195-201.

⁴⁸ See *Hearings on S. 3005*, at 463, 551.

⁴⁹ See *Hearings on Federal Role in Traffic Safety*, pt. 2, 819-20 for the many safety features incorporated into vehicles by Chrysler over the years.

⁵⁰ *Id.* Pt. 2, 1050-75.

⁵¹ *Id.* at 683-723 (Cornell Aeronautical Laboratory Reports).

⁵² See *Hearings on S. 3005*, at 574.

⁵³ *Id.* at 238.

⁵⁴ In 1955, Ford Motor Co. stressed safety in its advertising campaign for 1956 model cars. See *Hearings on S. 3005* at 894. When in 1956 Ford's sales dropped sharply, many apparently blamed this on the safety approach. See O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299, 363 (1963).

⁵⁵ For example, it has taken many years to make drivers understand the value of seat belts. Yet the National Safety Council estimated that in 1958 5,000 lives could be saved by the use of seat belts. See *Hearings on S. 3005*, at 140.

affect not only the safety of the purchaser himself but also that of his passengers and others on the road.⁵⁶ Even some manufacturers suggest "force-feeding" with safety features.⁵⁷ As to the design and manufacture of the car itself, obviously the manufacturers are in a better position to judge safety requirements than the average man.⁵⁸ Thus there may be truth in the accusation that in the past manufacturers have been more concerned with style because they have felt that style sells cars.⁵⁹ Inasmuch as the automotive industry is vital to the national economy, with millions of our population directly connected with it, the importance of the industry's continued ability to sell more and more vehicles cannot be underestimated. Yet the so-called public demand for style changes is probably industry-created through its advertising,⁶⁰ and arguably the same results could be achieved by channelling some of the funds spent on styling into safety research and by incorporating more safety features in the design. At the same time the accident problem could probably be alleviated by less stress on high-speed, high-powered cars. Since excess speed is thought to be one reason for driver-caused accidents, it may be the responsibility of the industry to establish the maximum speed and power necessary for today's roads and safe driving and to gear manufacture accordingly.⁶¹ In the past, competition among automobile manufacturers has been very keen. So long as some companies devoted a large part of their budget and advertising efforts to styling, others did not want to be in a less competitive position by stressing safety at the expense of styling, especially since past safety promotion was unsuccessful. Now that the government requires companies to comply with certain safety standards, they will probably spend more funds on safety research and design, but less on styling, and thus remain in the same competitive position. Any voluntary agreement among the competitors to decrease their styling budget would

⁵⁶ See *Hearings on Federal Role in Traffic Safety*, pt. 2 at 657-78 (General Motors' statement that public acceptance of safety devices is necessary; also industry's retreat from the idea that "safety does not sell").

⁵⁷ *Id.* at 871 (American Motors' President's suggestion that the purchaser should be required to delete the safety equipment which he does not desire).

⁵⁸ *Id.* at 677-78.

⁵⁹ See O'Connell, *supra* note 54, at 375. See generally R. NADER, *UNSAFE AT ANY SPEED* (1966); J. O'CONNELL & A. MYERS, *SAFETY LAST* (1966).

⁶⁰ Note, *Automobile Safety: A diagnosis of An Epidemic*, 23 WASH. L. REV. 327, 336 (1967).

⁶¹ See *Hearings on Federal Role in Traffic Safety*, Pt. 2, 906; *Hearings on H.R. 13228*, pt. 1, 320; *Hearings on S. 3005*, 421, 452-54.

probably have been subject to antitrust laws, though joint research facilities for developing safety standards would have been legal.⁶² Certainly, through the proposed federal program additional funds will be available for research, thus benefiting both the manufacturers and the public.⁶³

While there have been a few suggestions that the cost for research should come out of the manufacturers' profits,⁶⁴ most legislators probably assumed the costs would be transmitted to the buying public in the nature of increased motor vehicle costs.⁶⁵ No accurate estimates of the increased costs due to incorporation of safety features were available. It was believed the manufacturers would try to keep prices down, partly through elimination of features which serve no useful purpose and partly through mass economies by making some formerly optional equipment standard on all vehicles. Some features would probably involve no extra cost, since they would be incorporated as a part of the general design of the vehicle.⁶⁶

As to the federal government's intervention in the automobile industry, federal standards were not intended to cover every

⁶² See letter from the Antitrust Division indicating that joint efforts, not accompanied by unduly restrictive collateral agreements, to forward the use of safety devices or exchange information concerning standards of safety would not be prohibited by antitrust laws, *Hearings on S. 3005* at 542. A different situation would be presented, however, if the industry tried to enforce incorporation of the advances made in cooperative research in testing. Yet without enforcement possibilities there would never be any assurance to the public that the voluntary agreement would continue for long and would not be just a technique for avoiding federal legislation. The cigarette industry with its advertising code is an example of a voluntary agreement, which some members later repudiated, thus rendering it ineffective. See Levin, *The Limits of Self-Regulation*, 67 COLUM. L. REV. 603 (1967); Boyd and Claycamp, *Industrial Self-Regulation and the Public Interest*, 64 MICH. L. REV. 1239, 1245-52 (1966). It must also be remembered that the "big four" do not constitute the entire automotive industry. Even disregarding truck, bicycle and motorcycle manufacturers, there are many manufacturers who either produce equipment and parts for the initial manufacture of motor vehicles or for replacement and would be affected by any federal motor vehicle or equipment safety standards. Thus, for example, the Motor & Equipment Manufacturers Association alone consists of some 580 independent manufacturers of parts and equipment for the automobile industry; the Automotive Service Industry Association represents 1,000 automotive parts manufacturers, warehouse distributors and parts rebuilders, along with 5000 major wholesale firms. See *Hearings on H.R. 13228*, pt. 2 at 944, 1217.

⁶³ See 15 U.S.C. § 1409 (1964) for authorized appropriation.

⁶⁴ See *Hearings on Federal Role in Traffic Safety*, pt. 3 at 1238 (statement of Sen. Robert F. Kennedy).

⁶⁵ See *Hearings on S. 3005* at 36-40.

⁶⁶ *Id.* at 48, 49, 54, 88.

component and function of a motor vehicle but only those vehicle characteristics that have a significant bearing on safety.⁶⁷ The manufacturers' job would continue to be to design and manufacture the particular feature or equipment.

The Senate Committee on Commerce aptly summarized some of the reasons for federal legislation: the federal government had the primary responsibility for regulating the national automotive manufacturing industry; since the promotion of voluntary standards had failed, mandatory standards were the only course; and the federal government should develop individual facilities for comprehensive basic research of accident and injury prevention, adequate testing of safety performance and forming of meaningful standards, at the same time retaining vigorous competition among manufacturers. The Committee also found that the average man was incapable of evaluating safety of competing model cars. Thus both the industry and government should supply him with adequate information. Since in the past industry had been deficient in notifying and curing manufacturing defects, notification had to be made mandatory.⁶⁸ The House Committee conducting hearings on H.R. 13228 arrived at similar conclusions.⁶⁹ However, since the House and Senate each preferred its own draft to the proposed legislation, joint conferences were held in order to adjust the differences. Finally, an amended version of S. 3005, entitled the "National Traffic and Motor Vehicle Safety Act of 1966," covering all motor vehicles, including all trucks and buses, was approved by Congress⁷⁰ and became law on September 9, 1966. The purpose of this Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents" and therefore "to establish motor vehicle safety standards for motor ve-

⁶⁷ S. REP. NO. 1301, COMM. ON COMMERCE, 89th Cong., 2d Sess., 6 (1966).

⁶⁸ *Id.* at 2-8. It is interesting to note that other industries are becoming aware of the need for continuous improvement. Thus it was recently voiced in the insurance field that unless the insurance industry solves regulatory problems itself, the result will be federal legislation; that since the federal government was not interested in trying to manufacture automobiles, the auto manufacturers lost their freedom but kept their franchise. Inasmuch as the federal government is very interested in dispensing benefits to injured people, if the insurance industry fails to sustain the burden of proof that it measures up to potential and social standards of the government it will lose both its freedom and franchise as automobile insurers. See Kemper, *The Federal Signposts: Danger Ahead*, 1967 INS. L. J. 261, 271; Rose, *State Regulation of Property and Casualty Insurance Rates*, 28 OHIO ST. L. J. 669 (1967).

⁶⁹ See 112 CONG. REC. 18778 (daily ed. Aug. 17, 1966).

⁷⁰ See 112 CONG. REC. 20595 (daily ed. Aug. 31, 1966).

hicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register."⁷¹

II. BASIC PROVISIONS

Under the Safety Act the Secretary of Commerce⁷² must issue, on or before January 31, 1967, federal motor vehicle safety standards based on existing safety standards and new and revised standards on or before January 31, 1968.⁷³ Any state motor vehicle safety standard which relates to the same aspect of the vehicle as the federal standards must be identical, but the federal government or the government of any state or political subdivision may establish higher performance standards for vehicles or equipment procured for its own use.⁷⁴ The Interstate Commerce Commission may impose higher performance standards for special purpose trucks, if such standards can be complied with subsequent to manufacture of the vehicles.⁷⁵ After consultation with the National Motor Vehicle Safety Advisory Council,⁷⁶ the Vehicle Equipment Safety Commission,⁷⁷ and such other state and interstate agencies as he deems appropriate,⁷⁸ the standards issued by the Secretary must be reasonable, practicable, and appropriate for the particular type of motor vehicle or equipment involved,⁷⁹ and may be revoked or

⁷¹ 15 U.S.C. §§ 1381-1425 (Supp. II 1965-66). While some have claimed this legislation resulted from "extremists' campaigns and the sensationalism that resulted from the writing of a book" (probably referring to R. NADER *UNSAFE AT ANY SPEED*) 112 CONG. REC. 18783 (daily ed. Aug. 17, 1966), this is probably an exaggeration. Undoubtedly the various publications had resulted in a growing public concern for traffic safety; yet this might not have been sufficient to pass the Act were it not for the active support of many legislators who had been involved in traffic safety work in their own states and the various government agencies.

⁷² Subsequently all the powers vested in the Secretary of Commerce under this act were transferred to the Secretary of Transportation. 49 U.S.C. § 1655(1) (1964).

⁷³ 15 U.S.C. § 1392(h) (1964).

⁷⁴ 75 U.S.C. § 1392(d) (1964). It was intended that the various governments should continue to play a role in the development of standards.

⁷⁵ 15 U.S.C. § 1392(g) (1964).

⁷⁶ The Secretary must establish this Council under 15 U.S.C. § 1393 (1964). Its majority must represent the general public, including state and local government representatives; the remainder must include representatives of motor vehicle manufacturers, motor vehicle equipment manufacturers and motor vehicle dealers. This would allow independent manufacturers of equipment parts to be represented.

⁷⁷ 15 U.S.C. § 1392(f) (2) (1964).

⁷⁸ *Id.*

⁷⁹ *Id.* § 1392(a), (f) (3) (1964).

amended.⁸⁰ Orders affecting safety standards must specify the effective date, which normally must be not less than 180 days or more than one year after issue of such orders.⁸¹

For a judicial review, any person adversely affected⁸² by the orders of the Secretary may appeal within sixty days after the issuance of an order to the United States court of appeals for the circuit wherein such person resides or has his principal place of business.⁸³ The judgment of the court affirming or setting aside any order of the Secretary is final, subject only to review by the Supreme Court of the United States.⁸⁴ A certified copy of the transcript of the record and proceedings is admissible in any proceedings arising under the Act.⁸⁵

The Secretary must conduct research, testing, development, and training necessary to carry out the purposes of the Act.⁸⁶ He may do this through grants to states, interstate agencies, and non-profit institutions.⁸⁷ The results of federally-sponsored research programs are to be available to the public.⁸⁸ The Secretary may cooperate with other agencies in developing standards and methods for inspecting and testing compliance.⁸⁹

The Act specifically prohibits the manufacture for sale, sale, offer for sale, importation, or introduction in interstate commerce of any motor vehicle or item of motor vehicle equipment manufactured on or after the effective date of any applicable federal motor vehicle safety standard, unless such standard has been complied with.⁹⁰ However, the Act does not apply once the vehicle or equipment has been sold to the public⁹¹ and exempts articles destined for export and appropriately tagged.⁹² Also exempt from the Act is any person who establishes that he did not know or have reason to know in the exercise of due care that the vehicle

⁸⁰ *Id.* § 1392(e) (1964).

⁸¹ *Id.* § 1392(c) and (e) (1964).

⁸² Intent was to make this section applicable not only to manufacturers or dealers but also to automobile owners. 112 CONG. REC. 18795 (daily ed. Aug. 17, 1966).

⁸³ 15 U.S.C. § 1394(a) (1) (1964).

⁸⁴ *Id.* § 1394(a) (4) (1964).

⁸⁵ *Id.* § 1394(b) (1964).

⁸⁶ *Id.* § 1395(a) (1964).

⁸⁷ *Id.* § 1395(b) (1964).

⁸⁸ *Id.* § 1395(c) (1964).

⁸⁹ *Id.* § 1396 (1964).

⁹⁰ *Id.* § 1397(a) (1) (1964).

⁹¹ *Id.* § 1397(b) (1) (1964).

⁹² *Id.* § 1397(b) (5) (1964).

or equipment fails to comply with applicable federal safety standards or holds a certificate of conformance issued by the manufacturer or importer, unless he knows of nonconformance.⁹³ In addition, temporary imports are exempted and permanent imports may be permitted when the Secretary of Treasury and Secretary of Commerce (now Secretary of Transportation) are satisfied that the vehicle or equipment will be made to conform to the appropriate federal safety standards.⁹⁴

The law also provides for inspection and investigation necessary to enforce the federal vehicle safety standards.⁹⁵ Upon presenting proper credentials, the Secretary of Commerce or his agent may enter any factory or other place in which motor vehicles or equipment are manufactured.⁹⁶ Manufacturers must provide the Secretary with data related to performance and safety.⁹⁷ The Secretary is required to keep any trade secrets confidential,⁹⁸ unless disclosure to other government employees is necessary to enforce the Act.⁹⁹

Within a reasonable time after discovery of a safety-related defect, the manufacturer must notify by certified mail the first purchaser of the vehicle or equipment, or dealer to whom delivery was made, clearly describing such defect, evaluating the safety risk, and informing of the measures to be taken to repair such defect.¹⁰⁰

Every manufacturer must also notify the Secretary of any communication to purchasers and dealers regarding any defect.¹⁰¹

⁹³ *Id.* § 1397(b) (2) (1964).

⁹⁴ *Id.* § 1397(b) (3) (1964).

⁹⁵ *Id.* § 1401(a) (1964).

⁹⁶ *Id.* § 1401(b) (1964). Cases have long upheld the investigative powers of administrative agencies as well as their orders for production of documents. *See, e.g.,* *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Louisville & N.R.R.*, 236 U.S. 318 (1915). But there are limitations. *See* *United States v. International Nickel Co.*, 203 F. Supp. 739 (S.D.N.Y. 1962), which held the government cannot be present when the company is determining which documents to furnish. The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 374 (1964), attempted to be more specific by stating that inspection shall not extend to financial data, sales data other than shipment data, pricing data, personnel data and research data. The Safety Act could similarly have been made more specific to avoid future litigation.

⁹⁷ 15 U.S.C. § 1401(d) (1964).

⁹⁸ *Id.* § 1401(e) (1964).

⁹⁹ *Id.* §§ 1401(e), 1402(d) (1964).

¹⁰⁰ *Id.* § 1402(a), (b) and (c) (1964). In case of a sale, a subsequent purchaser to whom a warranty has been transferred must be notified.

¹⁰¹ *Id.* § 1402(d) (1964).

If the Secretary determines through testing, inspection, investigation, research, or examination of reports that any vehicle or equipment does not comply with applicable federal motor vehicle safety standards or contains a safety-related defect, he must immediately notify the manufacturer of his findings and give him an opportunity to refute. If the latter fails to establish compliance or lack of defect, the Secretary must order him to notify the purchaser and the dealer.¹⁰²

Every manufacturer or distributor of a motor vehicle or equipment must at the time of delivery furnish to the distributor or dealer a certification that such vehicle or equipment conforms to all applicable federal safety standards. Motor vehicles must show such certification in the form of a permanent label or tag.¹⁰³

Failure to comply with the safety standards, failure to make reports, refusal to allow inspection, failure to issue the certificate, issuance of a false certificate, or failure to notify of defects¹⁰⁴ is subject to a civil penalty, not to exceed 1,000 dollars for each prohibited act, with a maximum penalty of 400,000 dollars for any related series of violations, which the Secretary is authorized to compromise.¹⁰⁵

The United States district courts have jurisdiction to enjoin violations of safety standards and restrain sale or introduction into interstate commerce or importation of noncomplying vehicles or equipment. The Secretary must give the defendant an opportunity to present his views and achieve compliance, except in case of a knowing and willful violation.¹⁰⁶ Criminal contempt proceedings may be brought for violation of an injunction or restraining order.¹⁰⁷ Actions for civil penalty as well as injunctions may be brought in the district where the violation occurred or where the defendant is found, is an inhabitant, or transacts business; process may be served in any district where the defendant is an inhabitant or may be found.¹⁰⁸ Subpoenas for witnesses may run into other districts.¹⁰⁹ Importers must designate an agent for service of process; in default of such designation, service of process may

¹⁰² *Id.* § 1402(c) (1964).

¹⁰³ *Id.* § 1403 (1964).

¹⁰⁴ *Id.* § 1397(a) (1964).

¹⁰⁵ *Id.* § 1398 (1964).

¹⁰⁶ *Id.* § 1399(a) (1964).

¹⁰⁷ *Id.* § 1399(b) (1964).

¹⁰⁸ *Id.* § 1399(c) (1964).

¹⁰⁹ *Id.* § 1399(d) (1964).

be made by posting such process, notice, order, etc., in the office of the Secretary.¹¹⁰

The Secretary is also required to make an annual report to the Congress regarding the administration of the Act. The report must include accident and injury statistics, a list of federal standards, the degree of observance of the standards, a summary of current research grants and contracts, a review of research activities completed and technological progress achieved during the year, and the extent of which information was disseminated.¹¹¹

Within one year after enactment of this Act, the Secretary must study the adequacy of motor vehicle safety standards and inspection requirements and procedures applicable to used motor vehicles in the various states and make recommendations for necessary additional legislation in his annual report. He must establish uniform federal motor vehicle safety standards for all used motor vehicles within one year after the report.¹¹²

Title II of the Act deals with tire safety.¹¹³ As part of pneumatic tire standards, the Secretary must require the tires be specifically labeled to identify the manufacturer or retreader; show the composition of the material used, actual number of plies, and the maximum permissible load; and recite that the tire conforms to federal minimum safe performance standards.¹¹⁴ In addition, each motor vehicle must be equipped by the manufacturer or first purchaser with tires that meet the maximum permissible load standards.¹¹⁵ The Secretary is also ordered to prescribe a uniform quality grading system for motor vehicle tires.¹¹⁶ No regrooved tires may be sold unless permitted by the Secretary.¹¹⁷

Title III¹¹⁸ of the Act deals with accident and injury research. The Secretary is authorized to make a complete investigation of the need for research, development, and testing facilities regarding traffic safety and relating to safety of machinery used on highways or in connection with their maintenance, and must

¹¹⁰ *Id.* § 1399(e) (1964).

¹¹¹ *Id.* § 1408 (1964).

¹¹² *Id.* § 1397(b) (1) (1964).

¹¹³ *Id.* §§ 1421-26 (1964).

¹¹⁴ *Id.* § 1421 (1964).

¹¹⁵ *Id.* § 1422 (1964).

¹¹⁶ *Id.* § 1423 (1964).

¹¹⁷ *Id.* § 1424 (1964).

¹¹⁸ Pub. L. No. 89-563, §§ 301-303, Sept. 9, 1966, 80 STAT. 729.

report to Congress by December 31, 1967.¹¹⁹

Title IV of the Act is an amendment of a former Act¹²⁰ providing for a register of drivers with revoked motor vehicle operator's license. In the future the states must report licenses which have been denied, terminated, or temporarily withdrawn for periods longer than six months.¹²¹

III. ORGANIZATION

Following the enactment of the new law, the Secretary of Commerce delegated authority to perform the functions under the National Traffic and Motor Vehicle Safety Act to the Under Secretary of Commerce for Transportation. The latter established the National Traffic Safety Agency, which was headed by a Traffic Safety Administrator appointed by the President.¹²²

On October 15, 1966, the Department of Transportation Act was adopted creating the Department of Transportation to be headed by the Secretary of Transportation, who was to be appointed by the President.¹²³ All functions, powers and duties of the Secretary and others in the Department of Commerce under various laws relating to transportation, including the National Traffic and Motor Vehicle Safety Act of 1966, were transferred to the new department.¹²⁴ Established within this new department was a Federal Highway Administration, a Federal Railroad Administration and a Federal Aviation Administration, each headed by an Administrator.¹²⁵ Most of the functions, powers, and duties vested in the Secretary of Transportation relating to highway safety were delegated to the Federal Highway Administrator.¹²⁶ A Bureau of Public Roads, a National Highway Safety Bureau and a National Traffic Bureau, each headed by a Director reporting to the Federal Highway Administrator, were established within the Federal Highway Administration.¹²⁷ The National Highway Safety

¹¹⁹ Pub. L. No. 89-563, § 302, Sept. 9, 1966, 80 STAT. 729.

¹²⁰ Pub. L. No. 86-660, §§ 1-3, July 14, 1960, 74 STAT. 526, as amended by Pub. L. 87-359, Oct. 4, 1961, 75 STAT. 779.

¹²¹ Pub. L. No. 89-563, § 401, Sept. 9, 1966, 80 STAT. 718.

¹²² See 31 Fed. Reg. 15101 (1966).

¹²³ Pub. L. No. 89-670, 80 STAT. 931, 49 U.S.C. §§ 1651-59 (1964).

¹²⁴ 49 U.S.C. § 1655(1) (1964).

¹²⁵ 49 U.S.C. § 1652(e) (1) (1964). All other provisions of the Safety Act remained applicable. 49 U.S.C. § 1652(f) (1) (1964).

¹²⁶ 32 Fed. Reg. 5606 (1967).

¹²⁷ *Id.*

Agency¹²⁸ and the National Traffic Safety Agency were consolidated into the new National Highway Safety Bureau.

IV. EFFECTIVENESS OF THE ACT IN TERMS OF STANDARD-MAKING

While the constitutionality of the Act has not yet been tested in courts, it will probably be upheld. Long ago, in a case involving state legislation of vehicles, the Supreme Court implied that federal control of motor vehicles for the purpose of safety was proper; only the absence of national legislation enabled the states to exercise such activity.¹²⁹ In addition, the power of Congress under Article I, section 8, clause 3 of the United States Constitution "To regulate Commerce . . . among the several states" and under clause 18 "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ." has been interpreted broadly in the past, even to reach such activities as discrimination in motels¹³⁰ or restaurants.¹³¹ As recently reiterated,¹³² the activities that are beyond the reach of Congress are "those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."¹³³ No strong argument can be made that the manufacture or sale of motor vehicles or equipment is a strictly local activity.

While the Act itself does not specify any standards but orders the Secretary of Commerce (or Secretary of Transportation, as now amended) to establish them, safety regulations made pursuant to constitutional statutory authority have in the past been held to

¹²⁸ The Safety Act had a companion bill, the Highway Safety Act of 1966, 23 U.S.C. §§ 401-04, (Supp. II 1965-66), enacted "to provide for a coordinated national highway safety program through financial assistance to the states to accelerate highway traffic safety programs." Under this Act the Secretary of Commerce had to develop uniform standards to improve pedestrian and driver performance (including education, testing, physical and mental examination, and licensing) and to provide for an effective system of accident investigating and recording, vehicle registration, operation and inspection, highway design and maintenance, vehicle codes and laws, emergency services, etc. While the Act provided for federal appropriations, the programs were to be state-administered. 23 U.S.C. § 402 (1964). As originally enacted, the Secretary had to carry out the provisions of the Act through a National Highway Safety Agency. Pub. L. 89-509, 80 Stat. 735, § 201.

¹²⁹ See *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915).

¹³⁰ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹³¹ See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

¹³² *Id.* at 302.

¹³³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

have the same force as though prescribed by the statute,¹⁸⁴ unless the statutory authority is exceeded.¹⁸⁵ While the Secretary's authority to set standards thus seems to be clear, there may be litigation as to whether particular standards set by the Secretary are valid in light of the very general language used in describing the standards:

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such . . . standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.¹⁸⁶

The definition of standards is equally general:

'Motor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.¹⁸⁷

This generality was deliberate to allow for a continuous updating of the standards. Congress could have detailed the standards, but this would have required it to spend much time initially and each year thereafter in considering improved standards and taking appropriate legislative action. Certainly, legislation expressed in equally general and vague terms has been sustained by courts in the past.¹⁸⁸

But interpretation problems may arise. For example, what is meant by "appropriate"? The intent was to allow the Secretary to consider the variety of vehicles on the road and to set basic minimum standards for all vehicles without eliminating some vehicles, such as sports cars and convertibles, for whom some standards might be impossible to design and apply. There would be differences in standards based on the type of vehicle involved.¹⁸⁹ Also,

¹⁸⁴ *New Amsterdam Casualty Co. v. Novick Transfer Co.*, 274 F.2d 916, 919 (4th Cir. 1960).

¹⁸⁵ See Fleming, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 96-98 (1950) for challenges to statutes.

¹⁸⁶ 15 U.S.C. § 1392(a) (1964).

¹⁸⁷ *Id.* § 1391(2) (1964).

¹⁸⁸ See, e.g., *Sherman Act*, 15 U.S.C. §§ 1-7 (1964), with its reference to "restraint of trade," which at first was held to condemn "every" restraint without exception, *United States v. Trans-Missouri Freight Assn.*, 116 U.S. 290 (1897), then interpreted to allow restraints lawful at common law, *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898), and finally construed to require the application of the "Rule of Reason," *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

¹⁸⁹ See 112 CONG. REC. 18794 (daily ed. Aug. 17, 1966).

what is a "practicable" standard? Industry representatives suggested that the text of the Act should be so written as to make it clear that the Secretary in setting standards should not think in terms of whether they are "adequate" or "reasonable" but whether they are worth the cost required to put them into effect.¹⁴⁰ These spokesmen contend there should be several determinations: (1) cost versus benefit; (2) practicality, *i.e.*, whether in light of existing engineering and manufacturing knowledge devices can be designed and produced to meet the standards; and (3) available time, since compliance within six months with any new safety performance standard for any vehicle characteristic not already developed and planned for production is generally impossible.¹⁴¹ Legislators apparently felt that the general words of the statute would allow the Secretary to analyze all pertinent data. Similarly, a question can be raised as to when does a standard "meet the need for motor vehicle safety."¹⁴²

Some of these questions may already have been informally raised. This appears from an examination of the standard-making process during the past year. Initially twenty-three standards were proposed on November 30, 1966, to become effective September 1, 1967. These standards generally applied only to passenger cars and were of three types: (1) standards designed to reduce the likelihood that crash will take place; (2) standards designed for occupant protection in interior impact; and (3) standards designed to reduce post-crash dangers.¹⁴³ When the industry reacted by

¹⁴⁰ See *Hearings on H.R. 13228*, pt. 1 at 300.

¹⁴¹ *Id.* at 300.

¹⁴² Definition of standards could have been clarified somewhat by adding that it should include (1) publication of the technical reasoning employed for its promulgation, which would disclose the evidential process leading to the accepted safety level, and (2) a statement of the conditions of usage for which it is designed to be effective, for easier understanding of the standards. See *Hearings on S. 3005* at 276-77.

¹⁴³ Standards designed to reduce the likelihood that a crash will take place covered such items as central location and identification of controls, transmission shift level sequence, starter interlock and transmission braking effort, windshield defrosting and defogging, windshield wiping and winding systems, hydraulic service brake and parking brake systems, hydraulic brake hoses, reflecting surfaces, lamps, reflecting devices, new pneumatic tires, tire selection and rims, and rear view mirrors. Standards designed for occupant protection covered head restraints, impact protection for driver from steering control system, steering control rearward displacement, glazing materials to reduce superficial and deep lacerations from being thrown through windows, door latches and supports, anchorage of seats, seat belt installation and assemblies, seat belt anchorages, wheel nuts, wheel discs and hub caps. Standards designed to reduce post-crash dangers dealt with fuel tanks, fuel tank pipes and connections. See 31 Fed. Reg. 15212 (1966).

stating that only ten standards could be met by the effective date and that other standards required extensive design change,¹⁴⁴ it may have been questioning the practicality of the standards in terms of available time. When the manufacturers called the subsequently revised standards illegal,¹⁴⁵ they may, in fact, have been questioning whether the standards were practicable in light of the available time, existing engineering and manufacturing knowledge, and cost involved. Withdrawal of some standards by the Secretary may indicate he was not certain, upon reconsideration, that the particular standards met the need for motor vehicle safety.¹⁴⁶

Whether 1968 standards will actually make driving safer is debatable. Many contrary opinions have been heard. Industry requests for modification indicate it felt major changes were involved. Some experts, on the other hand, have resigned in protest over "weakening" of standards.¹⁴⁷ Yet the first step has been made, and hopefully satisfactory procedures for drafting, proposing and adopting standards have now been worked out. At the same time it must be remembered the standards adopted to date have been based on existing standards.¹⁴⁸ In the future, the first step may be research and testing. If the legislators' interest in motor vehicle safety is sustained, so that sufficient funds are allocated for safety purposes,¹⁴⁹ perhaps the optimistic predictions that by 1970 there

¹⁴⁴ Standards which could not be met dealt with reflecting surfaces, tires, lighting, interior protection, and seat and seat belt anchorage. The government then proposed 20 revised standards, with standards for pneumatic tires, tire selection and rims, and installation of head restraints being temporarily withdrawn. See 32 Fed. Reg. 11776 (1967).

¹⁴⁵ Ford and American Motors, respectively. See CONG. Q. WEEKLY REPORT, Jan. 13, 1967, at 73.

¹⁴⁶ For example, requirement for shoulder harnesses was withdrawn pending the Safety Administrator's discussions with European automotive safety experts. See 32 Fed. Reg. 10072-3, 11776-7 (1967) for other revisions in initial standards.

¹⁴⁷ E.g., William I. Stieglitz, see CONG. & WEEKLY REPORT, Feb. 10, 1967, at 203. But see U. S. NEWS & WORLD REPORT, Oct. 16, 1967, at 66 for the National Safety Director's statement that preliminary research shows such safety features as better laminated windshields and energy-absorbing steering assemblies can reduce chances of death or serious injury by 70 to 80 percent in a crash.

¹⁴⁸ Many of the initial standards were adopted from existing GSA or Society of Automotive Engineers' standards. See Hewitt, *National Safety Head Addresses Auto Industry*, POLICE, March-April 1967, at 36, 39.

¹⁴⁹ Note that due to budgetary difficulties, the Interstate Commerce Commission has never been able to inspect more than 40,000 trucks a year. See *Hearings on H.R. 13228*, pt. 2, at 1052. Note also that the House Appropriations Committee for the year beginning July 1, 1967, voted to brake the federal auto-safety program by denying \$10 million of the \$31 million requested. See *Wall Street Journal*, July 14, 1967, at 3, col. 2.

may be safety equipment in motor vehicles making it almost impossible to kill anyone in an accident at a speed of forty-five miles per hour will prove true.¹⁵⁰

The experience of past years reveals, however, that even though the Safety Act has been termed "mandatory," its success depends greatly on the industry's voluntary cooperation. Unwarranted objections or requests for consideration of standards could greatly delay the process. Similarly, any petition for review by the federal court of appeals may considerably delay the effective date of any standard.

One problem is that the present standards affect only new vehicles, some 9,300,000 each year. Since a vehicle has an expected life of 100,000 miles and ten years, for many years a new car owner, buying each year a less accident-prone car and a car safer in case of an accident, will still be facing accidents inflicted by other vehicles which not only lack safety features but are totally unsafe. Hopefully, legislation will be passed under the grant-in-aid provisions of the Highway Safety Act of 1966 to at least require inspection and maintenance of vehicles.¹⁵¹

V. EFFECTIVENESS OF THE ACT IN TERMS OF ENFORCEMENT

A. Dealers' and Distributors' Rights

Assuming that appropriate standards are established each year, there still remains the question of enforcement. As previously outlined, the Secretary has various means, such as penalties, injunctions and contempt actions, to enforce compliance with the Act.¹⁵² But, inasmuch as the purpose of the Act is to benefit the general public, is there any enforcement possible by ultimate consumers? While there may be indirect individual participation¹⁵³ and relief,¹⁵⁴ the

¹⁵⁰ See Main, *A Slow Getaway for the Auto Market*, FORTUNE, June 1, 1967, 111, 164.

¹⁵¹ See note 128 *supra*.

¹⁵² See 15 U.S.C. §§ 1398, 1399(a) and (b) (1964).

¹⁵³ E.g., an individual motor vehicle owner might qualify as a "person adversely affected" and be allowed to petition for review of the Secretary's orders regarding standards. *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953) held regarding a similar section under the Food, Drug and Cosmetics Act that an oleomargarine consumer's allegation that the administrator's order violated the statute disclosed a "case of actual controversy" and that the asserted consumer interest constituted the consumer a person "adversely affected" to allow him to seek judicial review of the order. Also, there may be some procedure established whereby a motor vehicle or equipment owner may register a complaint against a noncomplying party with the Safety Bureau.

Act directly provides for relief and private action only for one type of parties, namely, dealers or distributors of motor vehicles or motor vehicle equipment.¹⁵⁵ If a motor vehicle or equipment fails to meet the required standards or contains a defect relating to motor vehicle safety, the seller (manufacturer or distributor) prior to the sale of the vehicle or equipment by the purchaser (distributor or dealer), must either repurchase the vehicle or equipment or promptly deliver corrective parts to the purchaser and reimburse him for installation.¹⁵⁶ If the seller refuses to comply, the purchaser may bring suit in any district court of the United States in the district in which the seller resides or is found or has an agent, without respect to the amount in controversy and recover his damages plus all court costs and reasonable attorney fees.¹⁵⁷ Apparently, the object of this provision was to place the financial responsibility for noncompliance upon the one who fails to conform with the standards rather than upon the distributor or dealer who purchases the vehicle or equipment in reliance on a certificate of compliance. However, this section ignores the fact that motor vehicle parts and equipment are assembled at various stages and are not always sold by manufacturers or distributors and by distributors to manufacturers, but may involve sales among distributors or manufacturers. Moreover, in some cases a distributor may be held liable for his seller-manufacturer's noncompliance.

Some of the discrepancies can best be demonstrated by hypothetical situations: (1) Assuming that manufacturer *A* sells a vehicle to dealer *D* and that noncompliance is discovered before *D* has sold the vehicle, *A* must either repurchase the vehicle or furnish parts and reimburse installation costs; if *A* fails to do so under the Act he may be sued in the district court and found liable for *D*'s damages as well as court costs and attorney fees. If *D* has sold the

¹⁵⁴ Conceivably in an action brought on behalf of the government for penalty or injunction, the court could grant relief to injured consumers. Originally it was believed that equitable remedies in governmental litigation were not permitted unless authorized by the statute in express terms. Thus restitution to drug purchasers in a case brought at the instance of the Food and Drug Administration to restrain the introduction of certain misbranded drugs into interstate commerce was not allowed. See *United States v. Parkinson*, 240 F.2d 918 (9th Cir. 1956). But *Mitchel v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), upheld the implied power of a court to order reimbursement, even though the particular legislation only provided for an injunction.

¹⁵⁵ 15 U.S.C. § 1400 (1964).

¹⁵⁶ Plus one percent of the purchase price prorated for each month from date of notice to date of conformance. 15 U.S.C. § 1400(a) (1964).

¹⁵⁷ *Id.* § 1400(b) (1964).

vehicle nothing is required of *A*. (2) Assuming *A* manufacturers motor vehicle equipment¹⁵⁸ which he sells to distributor *X* and noncompliance is discovered before *X* has sold the equipment, again *A* must either repurchase the equipment or furnish parts or be sued. If *X* has sold the equipment to manufacturer *Z*, *A* has no further obligation under the Act. Presumably *Z* is a major manufacturer who is capable of exercising sufficient economic pressure to protect himself.¹⁵⁹ But what if *A* is a major manufacturer producing many types of equipment and *Z* is a small company? Or what if *X* is a large distributor and *Z* is a small outfit? Somehow, the economic reasons for protecting *X* and not *Z* are no longer applicable. (3) Assume that *A* has sold noncomplying equipment to *X*, which *X* has sold to *Y*, another distributor, and that noncompliance is discovered before *Y* has sold the equipment. *X* apparently is liable to *Y* because *Y* as a distributor is entitled to the protection of the law. *X* is not exempted because noncompliance was caused by *A*. Since *X* is only a distributor, he cannot furnish parts. Thus apparently he must repurchase the equipment and then proceed against *A* outside the Act for his damages. Neither *X* nor *Y* can proceed directly against *A* under the Act because of the intervening sale.¹⁶⁰ (4) Assuming that *A* sells noncomplying equipment either (a) directly to *Z* or (b) to *X* who in turn sells it to *Z* and that the noncompliance is discovered prior to *Z*'s sale of the equipment, *Z* has no remedies under the Act because he is a manufacturer, not a distributor.

Only dealers and distributors who sell to the general public and acquire the vehicle or equipment directly from the manufacturer are clearly protected. This situation implies that the provision was written for the usual automobile dealer who acquires the vehicles and most of the equipment and parts directly from the automobile manufacturer.¹⁶¹ Yet other parties may be equally worthy of protection. If the Act intended to place the financial responsibility on the nonconforming manufacturer, this could have

¹⁵⁸ Motor vehicle equipment is defined as any system, part, or component of a motor vehicle. *Id.* § 1391(4) (1964).

¹⁵⁹ Query: Is that a justifiable reason for denying someone a legal remedy?

¹⁶⁰ Note that 15 U.S.C. § 1400(a) (1964) simply states "prior to the sale of such vehicle or item of equipment." Where a sale to the general public is intended, this is specifically stated, such as in 15 U.S.C. § 1397(b)(1) (1964) which establishes that prohibitions of that section "shall not apply to the sale . . . after the first purchase of it in good faith for purposes other than resale."

¹⁶¹ In the past the automobile dealer has been found to be in an unequal bargaining position with his manufacturer, and special legislation was passed to protect him, e.g., "Automobile Dealers' Day in Court," 15 U.S.C. §§ 1221-25 (1964).

been achieved more easily by a statement that any person who purchases a nonconforming motor vehicle or equipment prior to its sale to the public may proceed directly against the noncomplying manufacturer, unless the latter repurchases or furnishes parts and pays for installation. Many states have recognized that lack of privity of contract is not essential in certain situations in their sales law.¹⁶² Products liability cases have allowed direct suits against the manufacturers of defective products.¹⁶³ Certainly, federal legislation can strive for similar results.

B. Consumers' Rights

Since most of the motor vehicle or equipment purchasers are ordinary consumers, who are neither motor vehicle or equipment dealers nor distributors, no remedies are available to them under the Safety Act. But the Act states that compliance with any federal motor vehicle safety standard issued thereunder does not exempt any person from any liability under common law.¹⁶⁴ Thus, conversely, the consumer must look to common law for enforcement of his rights also in case of noncompliance. Normally these would be contract or tort actions.

1. Remedies Based on Sales Law

The consumer probably has two major safety-related interests growing out of the Act, both arising with the purchase of the vehicle or equipment. The first concerns the motor vehicle standards, which according to the Act should be present. The second concerns safety-related defects. What can the consumer do when his new purchase lacks some standard or reveals a defect? Since this is a sales transaction, it is logical to turn to sales law to try to find remedies for the consumer.

¹⁶² The UNIFORM COMMERCIAL CODE, [hereinafter referred to as U.C.C.] adopted by most states, in § 2-318 specifically states that a seller's warranty extends to any natural person who is in the family or household of his buyer and is injured in person by breach of the warranty.

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 402A (1965) which promotes what is known as "strict liability" specifically states that one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which first definitely established that the ultimate consumer could proceed against the manufacturer directly. See also *Greenman v. Yuba Power Products*, 59 Cal.2d 57, 377 P.2d 897 (1963); *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 391 P.2d 168 (1964).

¹⁶⁴ 15 U.S.C. § 1397(c) (1964).

The history of sales law shows that sellers' responsibility for quality began with formal collateral promises of warranty. Over the years the formalities have become more and more relaxed, until finally sales law is according protection against any hidden material defects unless the parties have agreed otherwise.¹⁶⁵ Most states have adopted, with minor variations, the Uniform Commercial Code, which provides that if goods fail in any respect to conform to the contract upon delivery, the buyer may reject the whole, unless otherwise agreed.¹⁶⁶ Goods are defined as "conforming" when they are in accordance with the obligations under the contract.¹⁶⁷ The Code specifically states that, unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale, if the seller is a merchant with respect to goods of that kind.¹⁶⁸ Since a merchant is defined as a "person who deals in goods of the kind,"¹⁶⁹ this would embrace an automobile dealer who then becomes bound by any implied warranty of merchantability. Among the examples of merchantability mentioned in the Code, at least two fit a situation involving the sale and purchase of a motor vehicle: (1) the goods must be fit for the ordinary purposes for which they are used; and (2) they must conform to the promises or affirmations of fact made on the container or label.¹⁷⁰ It cannot be denied that a vehicle should be fit for driving and that it should conform to any certification required under the Act to indicate compliance with appropriate safety standards affixed to it.

In addition, the Code recognizes the creation of express warranties when the seller makes any affirmation of fact or when there is any description of the goods which become part of the

¹⁶⁵ See Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262, 236 (1964).

¹⁶⁶ U.C.C. § 2-601(a).

¹⁶⁷ *Id.* § 2-106(2).

¹⁶⁸ *Id.* § 2-314(1).

¹⁶⁹ *Id.* § 2-104(1).

¹⁷⁰ *Id.* § 2-314(2)(c) and (f). This affords increased consumer protection by rejecting the "adoption rule," which shielded a retailer from liability for having sold a product not measuring up to the manufacturer's claims printed on the package unless the dealer, by conduct other than simply stocking the merchandise, had "adopted" such claims as his own representation. See Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1438 (1966).

basis of the bargain;¹⁷¹ it is not necessary to use formal words or have a specific intention to make a warranty.¹⁷² Thus it can be argued that a manufacturer's certification affixed to a car, as required by the Act,¹⁷³ is an express warranty that the goods shall conform to the statement. It can be further argued that "description of goods" in case of a new model motor vehicle or equipment includes any requirements imposed on the manufacturer by law,¹⁷⁴ such as compliance with any established federal safety standards. While technically the manufacturer is not a seller to the purchaser of the vehicle,¹⁷⁵ and the Act requires the certification to be made to the dealer,¹⁷⁶ without such certification the dealer may be unwilling to sell the vehicle.¹⁷⁷ Thus such certification is necessarily made to induce the purchaser to buy, and the manufacturer should not be allowed to escape liability for breach of such "warranty"

¹⁷¹ U.C.C. § 2-313(1):

Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the books which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

While Comment 1 to § 2-313 indicates that express warranties rest on "dickered aspects of the individual bargain," Comment 2 recognizes that the warranty sections are not designed to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. See also Comment, *The Contractual Aspect of Consumer Protection: Recent Development in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1435 (1966).

¹⁷² U.C.C. § 2-313(2).

¹⁷³ 15 U.S.C. § 1403 (1964).

¹⁷⁴ A warranty is essentially a representation regarding the quality of particular merchandise. It becomes part of a sales agreement either because of the parties' agreement or because the law reads it into their contract. See *Dunn v. Texas Coca-Cola Bottling Co.*, 84 S.W.2d 545, 549 (Tex. Civ. App. 1935).

¹⁷⁵ U.C.C. § 2-103(1)(d) "Seller" means a person who sells or contracts to sell goods.

¹⁷⁶ 15 U.S.C. § 1403 (1964):

Every manufacturer or distributor of a motor vehicle or motor vehicle equipment shall furnish to the distributor or dealer . . . the certification that each such vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards

¹⁷⁷ A dealer would probably insist on a certification for his own protection, because if he sold a nonconforming vehicle he would be subject to penalty unless he could establish that he did not have reason to know of the nonconformance or "holds a certificate issued by the manufacturer . . . to the effect that such vehicle . . . conforms to all applicable Federal motor vehicle safety standards" 15 U.S.C. § 1397(b)(2) and (a)(1) (1964).

merely because of lack of privity of contract or because the warranty was not made directly to the purchaser.¹⁷⁸ The Code itself is silent regarding "vertical" privity, *i.e.*, privity between manufacturer and consumer, and the present case law is not conclusive.¹⁷⁹

At first glance it would seem that the consumer can proceed against the dealer (or possibly also the manufacturer) for breach of implied warranty in case of some safety-related defect and for breach of express warranty against the manufacturer. Unfortunately, the consumer's case is more complicated. Today a buyer in the course of the purchase of a motor vehicle or equipment usually receives a warranty, which in effect limits his remedies under sales law. Thus, for example, an automobile warranty guarantees the vehicle and equipment to be free from defects in material and workmanship under normal use and service. But it generally states that replacement or repair of certain specified parts is expressly warranted in lieu of any other express or implied warranties, including any implied warranty of merchantability, and of any other obligation on the part of the manufacturer or the selling dealer. This raises the question whether by such written warranty other express warranties can be disclaimed, such as those represented by a certification in the form of a permanent tag affixed to the vehicle. The Code provides that an implied warranty of merchantability can be excluded by mentioning merchantability and being conspicuous if the disclaimer is written.¹⁸⁰ Thus if the written disclaimer complies with this rule the implied warranty can be excluded. As to an express warranty, the Code indicates that an

¹⁷⁸ In the past, courts have invoked a number of fictions in order to avoid the harsh effect of the traditional application of the rule of privity of contract. Some courts have held manufacturers liable on an express warranty theory on the basis of representations found in his consumer-oriented advertisements or product labels. *See, e.g.*, *Inglis v. American Motors Corp.*, 3 Ohio St.2d 132, 209 N.E.2d 583 (1965) (express warranty found in manufacturers' representations in national advertising). Other courts have allowed a plaintiff to sue the manufacturer of a defective product on the theory that the retailer was the manufacturer's agent. *See General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

¹⁷⁹ The U.C.C. does not specifically permit a direct action by the consumer against the manufacturer but recognizes that developing case law may enlarge sellers' warranties. *See* U.C.C. § 2-313, Comment 2; U.C.C. § 2-318, Comment 3. *But cf.* *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966) (requirement of privity of contract applies to actions in assumpsit for breach of implied warranty under the U.C.C.); *Berry v. American Cyanamid Co.*, 341 F.2d 14, 15, n.1 (6th Cir. 1965) (though case was brought under the Uniform Sales Act, the court, interpreting Texas law, indicated privity between plaintiff and manufacturer would also be required under U.C.C.).

¹⁸⁰ U.C.C. § 2-316(2).

inconsistent disclaimer will be ineffective.¹⁸¹ In the present case, where there is an express warranty in the form of a certification and a separate disclaimer an inconsistent disclaimer will be ineffective.¹⁸¹ In the present case where there is an express warranty in the form of certification and a separate disclaimer, an inconsistency is present; the express warranty should prevail.

One example of past limitation of liability through the use of automobile manufacturer's warranties has been the exclusion of tires, which have been separately warrantied by tire manufacturers.¹⁸² Under the Safety Act's definition of motor vehicle equipment, tires appear to be included.¹⁸³ The certification section requires that every manufacturer of motor vehicles or equipment furnish the certification. In case of an item of motor vehicle equipment, such certification may be in the form of a label or tag on such item or on the outside of a container, or in the form of a permanently affixed label or tag in the case of a vehicle.¹⁸⁴ No exemption is made in the case of a vehicle manufacturer for equipment already certified by some other manufacturer. Thus the law apparently should be read as requiring the vehicle manufacturer to include tire standards as part of his certification where the vehicle is supplied with tires as part of the original equipment, even though tire manufacturers are to provide for additional labelling. Reference to tire purchasers in a section dealing with tire load standards may indicate recognition that manufacturer's responsibility ends when the purchaser picks his own tires.¹⁸⁵ Inasmuch as many vehicles come fully assembled, including tires, it does not seem too harsh to require the vehicle manufacturer to be liable for the entire

¹⁸¹ U.C.C. § 2-316(1):

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.

A certification creating an express warranty and a written warranty excluding other warranties are inconsistent with each other. It cannot be claimed that a negation is reasonable where it would operate to exclude some legal requirement.

¹⁸² See N. Y. Times, April 2, 1967, § 14A, at A13.

¹⁸³ See 15 U.S.C. § 1391(4) (1964) "'Motor vehicle equipment' means any system, part, or component of a motor vehicle"

¹⁸⁴ 15 U.S.C. § 1403 (1964).

¹⁸⁵ 15 U.S.C. § 1422 (1964).

The Secretary shall require that each motor vehicle be equipped by the manufacturer or by purchaser thereof at the time of the first purchase thereof in good faith for purposes other than resale with tires which meet the maximum permissible load standards

vehicle in such a case. He would be able to recoup his losses from the noncomplying equipment manufacturer better than the consumer who relied on the vehicle manufacturer to supply him with a vehicle conforming to all established federal motor vehicle and equipment safety standards.

A more difficult case is presented by a safety-related defect. The National Traffic and Motor Vehicle Safety Act provides only that the purchaser must receive notification from the manufacturer regarding any safety-related defect along with an evaluation of the risk and information concerning repairs.¹⁸⁶ As it relates to the consumer, the Act is silent about who is responsible for correcting the defect; it says nothing about the manufacturer's duty to recall the vehicle or equipment or to furnish parts and pay for installation. No express warranty regarding defects can be read into the Act in favor of the consumer. At best, the consumer may hope that the defect applies to a part of the vehicle covered by the manufacturer's warranty. Since today's warranties are broader than ever before, it may be that the defect affects a part of the vehicle which the warranty promises to repair or replace. If not, then the consumer must either rely on the manufacturer's willingness to go beyond the express warranties or pay for the repair or replacement himself and try to find a court willing to give him recovery on the basis of implied warranty of merchantability, regardless of the disclaimer. In the past some courts have held such disclaimers to be against public policy.¹⁸⁷ Alternatively, under the Code it is possible to argue that such a disclaimer is unconscionable.¹⁸⁸ Some of the cases not recognizing disclaimers have involved extensive property

¹⁸⁶ 15 U.S.C. § 1402(a) (1964).

¹⁸⁷ See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

¹⁸⁸ U.C.C. § 2-302(1)

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause

Some would find unconscionability in situations involving (1) unfair surprise, where there is no actual assent to terms of a contract, similar to contracts of adhesion, disclaimers of warranty provisions in manufacturers standard form contracts, or (2) oppression, where, although there has been actual assent, the agreement, surrounding facts, and relative bargaining position of the parties indicate the possibility of gross over-reaching on the part of either party. See Note, *The Doctrine of Unconscionability*, 19 MAINE L. REV. 81, 82-3 (1967).

damage or personal injuries.¹⁸⁹ It is debatable how willing a court would be to disregard a disclaimer in a case involving a minor repair. Other courts have ruled that disclaimers should be recognized.¹⁹⁰ Possibly the manufacturers will voluntarily extend their warranties to cover all federal safety standards and safety-related defects.¹⁹¹ Until they do so, the consumer's position remains unclear, and different courts may render different decisions involving the same type of standards and defects.

Another limitation often imposed by warranties concerns the available relief. Thus, for example, most new automobile warranties limit the purchaser's remedies to repair and replacement of defective parts. The Code specifically permits such contractual limitation of remedy, unless such remedy fails its essential purpose.¹⁹² If the newly purchased vehicle contains a safety-related defect which can be easily repaired, obviously the remedy is sufficient. A different situation arises when a vehicle simply fails to conform to some federal standard which must be built in the vehicle. Obviously no part can be replaced or repaired. Arguably, the essential purpose of the contract remedy has failed. But there are many unsolved questions, such as what should be the proper remedy; what is the dollar value of a safety feature, the effectiveness of which might be felt only upon impact in an accident; how much is the proper

¹⁸⁹ See *supra* note 163. But note that these cases did not involve the U.C.C.

¹⁹⁰ See, e.g., *Delta Air Lines, Inc. v. Douglas Aircraft*, 238 Cal. App.2d 95, 47 Cal. Rptr. 518 (1965), where waiver of all conditions or liabilities by seller was held valid when case involved no element of personal injury, privity of contract issue, or elements of inequality of bargaining, or adhesive contract. There was no thwarting of public policy through recognition of disclaimers in the commercial world where the buyer may be as able to absorb and administer the inevitable risks of the seller's operations.

¹⁹¹ But note that recently the automobile warranties became more limited when Chrysler announced that with its 1968 models, its five-year or 50,000 mile warranty would apply only to the first registered owner. General Motors and Ford made similar warranties applicable to first and second owners only, the second being required to pay a \$25 transfer fee. *Columbus Dispatch*, Oct. 2, 1967, at 18A, col. 6. Note also that industry practices differ. Automobile manufacturers have often recalled many cars voluntarily to correct possible defects. For example, early in 1967 Ford recalled 217,000 automobiles for brake malfunction checks and 85,000 Cougars for headlamp check, *Wall Street Journal*, Feb. 23, 1967, at 37, col. 2 and May 23, 1967, at 12, col. 3. General Motors recalled 12,600 Corvairs to put in new steering shifts and 26,000 Pontiacs for a brake check. *Wall Street Journal*, March 30, 1967, at 20, col. 1 and Feb. 13, 1967, at 5, col. 2. In the tire industry, some manufacturers have recalled tires for defects (e.g., Goodyear and Dunlop), while others claim that they have had no reason to consider recalls (Firestone). *Columbus Dispatch*, Sept. 10, 1967, at 10A, col. 6.

¹⁹² U.C.C. § 2-719.

placement of a gasoline tank worth before an accident has occurred and the car is surrounded by flames, etc. Possibly the only proper remedy would be cancellation of the sale and refund of the price paid,¹⁹³ but again it may be questioned whether a court would allow this in the presence of a limiting clause if the safety feature appears "minor."¹⁹⁴ The Code does provide that limitation of consequential damages must not be unconscionable and that limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable.¹⁹⁵ Conceivably, some court may extend "injury to the person" to include injury to his property. In essence, then, remedies may be limited for the consumer's smaller losses, involving design and manufacturing defaults, but are more freely provided for larger losses, such as personal injuries.¹⁹⁶

2. Remedies Based on Strict Liability Theory

Some of the problems encountered in sales law, such as privity of contract between the manufacturer and the purchaser, disclaimer of warranties and limitation of remedies, disappear where the action is based on strict liability in tort.¹⁹⁷ Such an action does not

¹⁹³ The buyer's need for an opportunity to reject goods appears strongest when goods have been purchased for use rather than resale; the extent which a defect in quality impairs the value may be difficult to establish. See Honnold, *Buyers' Right of Rejection*, 97 U. PA. L. REV. 457, 469 (1949).

¹⁹⁴ Under U.C.C. § 2-711(1), "Where . . . the buyer rightfully rejects or justifiably revokes acceptance . . . the buyer may cancel." When may he reject or revoke acceptance? Unless otherwise agreed (thus again a disclaimer of warranty or limitation of remedies would first have to be found nonapplicable), the buyer may reject if the goods fail in any respect to conform to the contract, U.C.C. § 2-601. But the buyer must state a particular defect which is ascertainable by reasonable inspection where the seller could have cured, U.C.C. § 2-605, and the seller may notify of intention to cure, U.C.C. § 2-508. It has been held that where a seller is willing to repair the item, the purchaser has no right of rescission. See *Wilson v. Scampoli*, 228 A.2d 848 (C.A.D.C. 1967). Presumably a defective vehicle design cannot be cured. If the buyer has accepted the vehicle rejection is precluded. If he knew of the nonconformity he cannot revoke acceptance unless the latter was on the reasonable assumption that the nonconformity would be seasonably cured, U.C.C. § 2-607(2), or if the nonconformity substantially impairs the value to him, U.C.C. § 2-608(1). Query: will absence of any safety standard or presence of any safety-related defect, as established with reference to the Safety Act, be considered as substantially impairing the value?

¹⁹⁵ U.C.C. § 2-719(3).

¹⁹⁶ See *Klein v. Asgrow Seed Co.*, 246 A.C.A. 102, 54 Cal. Rptr. 609, 618, 619, n. 8 (Dist. Ct. of App. 1966), which presents an interesting handling of a limitation of liability clause.

¹⁹⁷ See *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965).

depend on any warranty under a contract of sale. Instead, it is based on the manufacturer's liability for placing a defective article on the market, imposed on him by law. Any provisions in the contract of sale regarding the product generally become immaterial.¹⁹⁸ While the textbook definition of the tort requires the product at the time of its sale to be in a defective condition unreasonably dangerous to the user or consumer or to his property,¹⁹⁹ in many instances courts have broadened the application of the tort action to include instances where the defective product could be considered dangerous only by using hindsight after the defect has caused some personal injury or property damage.²⁰⁰ At the same time, though, the manufacturer is not an insurer for all injuries caused by his product but only for those attributable to a defect in the product at the time of the sale by him.²⁰¹ Thus one of the first questions for a court to determine is whether a defect has been alleged.²⁰² While "defects" as found in the individual cases cover a wide range, it has been suggested that the nature and scope of a defect may be delineated by reference to six categories: (1) the product must be one that is unreasonably dangerous; (2) it involves unexpected danger; (3) it bears inadequate warning concerning dangers from proper use; (4) it has a defect which is not natural to the product; (5) it produces a reaction which is not an isolated occurrence; or (6) the product creates an ultra-hazardous condition.²⁰³ While a safety-related defect in a motor vehicle or equipment would fit most of these categories, it may be questioned whether a court would say the same regarding the absence of some safety standard, such as one dealing with passenger impact after an accident, if no

¹⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 402A, Comment m at 355 (1965). *Accord*, *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 897, (1964).

¹⁹⁹ See Kessler, *Products Liability*, 76 YALE L. J. 887, 906 (1967). See also RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, at 352 (1965).

²⁰⁰ See, e.g., *Chapman v. Brown*, 198 F. Supp. 78 (D Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (hula skirt); *Hoskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953) (dictum) (seeds).

²⁰¹ See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366-67 (1965).

²⁰² See *Lonrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966), which lists certain elements which plaintiff must prove to the jury's satisfaction to recover for personal injuries: (1) the product was defective; (2) it was defective at the time of the sale by the manufacturer; (3) the defect directly and proximately caused the plaintiff's injury; and (4) the plaintiff's presence could reasonably be anticipated.

²⁰³ Freedman, "Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 TENN. L. REV. 323 (1966).

accident has yet occurred. If an accident occurs and if it can be proved that but for the absence of a feature complying with a safety standard injuries would be nonexistent, hindsight may find the default "unreasonably dangerous."²⁰⁴

Most strict liability cases have involved personal injuries²⁰⁵ and property damage.²⁰⁶ But some cases have extended the action to cover "economic loss,"²⁰⁷ namely, the difference between what the product would have been worth without the defect and the product as obtained.²⁰⁸ Others maintain that warranty theory was not suited to the field of liability for personal injuries and, therefore, it was abandoned in favor of strict liability in tort. Since the rules governing warranties are appropriate in commercial transactions, a strict

²⁰⁴ Today the major barrier to recovery may lie not in finding law to support the doctrine but rather in ferreting out the existing evidence in order to make use of the law. There must be an investigation of the situs of the accident and a gathering of external evidence to show the creation of an unreasonable risk by the manufacturer through faulty product design (or manufacture). Yet too often the damaged vehicle is not available for identification of the injurious design and the pattern of injury to the plaintiff because it has been towed away to the junk yard or to the repair shop. Often counsel has not accumulated sufficient scientific engineering knowledge. See Nader, *Automobile Design: Evidence Catching Up With the Law*, 42 DENVER L.C.J. 32, 33 (1965). Also, what might have been sufficient evidence in the early cases when strict liability was first established, e.g., *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960) (physically impossible to determine whether any part of the steering wheel mechanism had been defective, and no effort to negate other causes), may not be sufficient today, e.g., *Jakubowski v. Minneapolis Mining & Mfg. Co.*, 42 N.J. 177, 199 A.2d 826 (1964) (proof of defect cannot be demonstrated simply by evidence of careful conduct of the plaintiff or other third party handling or using the product). See note 203 *supra* at 325.

²⁰⁵ *Supra* note 189.

²⁰⁶ See, e.g., *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N. Dakota 1965); *Spence v. Three Rivers Builders & Masonry Supply Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

²⁰⁷ See, e.g., *Randy Knitware, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

²⁰⁸ See Note, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966).

²⁰⁹ See *Seely v. White Motor Co.*, 63 Cal.2d 915-19, 403 P.2d 145, 149-51 (1965). The main reason for strict liability is said to be "risk spreading." See Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1120 (1960). This argument maintains that those who suffer injury from defective products are unprepared to meet the consequences, whereas the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. See *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 441 (1944) (concurring opinion). But see generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

liability action should not be available for economic loss.²⁰⁹ Another possibility, however, is to allow strict liability in cases involving consumers, because they are not in an equal bargaining position with the manufacturer. The consumer is unable to protect himself from insidious contractual provisions, such as disclaimers, foisted upon him by commercial enterprises and is seldom steeped in the business practice which justify the notice requirements.²¹⁰

Thus there are essentially three reasons why the theory of strict liability, though more liberal in some respects than sales law, may fail to provide a remedy where a purchaser of a motor vehicle or equipment attempts to bring an action for noncompliance with federal safety standards or presence of safety-related defects. First, all jurisdictions have not accepted the doctrine of strict liability in tort against the manufacturer for damages arising out of a defective product.²¹¹ Second, some jurisdictions still require that a defective product be inherently dangerous, at least in light of hindsight; it may be difficult to prove prior to an accident that the lack of a safety standard is inherently dangerous, unless the courts hold that because Congress has determined the necessity of such standards for the safety of the public their absence makes the vehicle or equipment inherently dangerous. Third, some jurisdictions may not allow a strict liability action for economic loss.

3. Remedies Based on Doctrine of Misrepresentation

The consumer may also attempt to enforce his interests arising out of the Safety Act by claiming misrepresentation. While misrepresentation often appears in the law of torts as a method of accomplishing various types of tortious conduct,²¹² as a separate tort it has been identified with the action for damages for deceit. Deceit was originally closely allied to the action for breach of warranty but later became disassociated and today exists independent of any contractual relations, though it usually involves a business transaction between two or more parties. What the law protects is the interest in formulating business judgments without being misled by others. Conduct leading to liability for deceit

²⁰⁹ See *Seely v. White Motor Co.*, 63 Cal.2d 9, 27, 403 P.2d 145, 158 (1965) (dissenting opinion).

²¹¹ See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

²¹² Liability in damages for misrepresentation may be based upon intent to deceive, upon negligence or upon a policy which requires defendant to be strictly liable for his statement. PROSSER, *HANDBOOK OF LAW OF TORTS* 698 (1964).

consists of: (1) false representation made by the defendant regarding some fact; (2) scienter, *i.e.*, knowledge or belief on the part of the defendant that the representation is false, or insufficient information on the defendant's part for him to make the statement; (3) intention to induce the plaintiff to act or to refrain from acting in reliance upon the representation; (4) justified reliance upon the representation by the plaintiff; and (5) damage caused by such reliance.²¹³ Thus if a vehicle carried the requisite certification under the Safety Act but, in fact, some federal motor vehicle or equipment safety standard had not been met, the consumer could argue the manufacturer was liable for misrepresentation.

But the consumer may have trouble proving scienter and damages. The task of measuring the value of the various safety features and the difference, for example, between the value of a specially padded panel, which might prevent injury in case of an accident, and the value of an ordinary panel as installed in a vehicle, may prove overwhelming. Nominal damages have been held insufficient for finding liability in a deceit action.²¹⁴ One procedural alternative may aid here. Out of common law procedure a doctrine developed that where the commission of a tort results in the unjust enrichment of the defendant at the plaintiff's expense, the plaintiff may disregard or "waive" the tort action and instead sue on a theoretical and fictitious contract for restitution of the benefits which the defendant has so received. Restitution in quasi-contract looks to what the defendant has received, which may be either more or less than the plaintiff's actual loss.²¹⁵ Once the plaintiff has tendered the goods and rescinded the contract, he can ask for restitution based on misrepresentation.²¹⁶ Some of the other requirements of the action also become less strict. Restitution may be allowed even though the misrepresentation is negligent²¹⁷ or innocent,²¹⁸ the

²¹³ 1 HARPER & JAMES, THE LAW OF TORTS 527-28 (1956).

²¹⁴ See, e.g., *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59 (1896) (damages must be established with reasonable certainty and must not be speculative or contingent); *Alden v. Wright*, 47 Minn. 225, 49 N.W. 767 (1891) (nominal damages cannot be awarded).

²¹⁵ PROSSER, *supra* note 212 at 644 (1964).

²¹⁶ See, e.g., *E.T.C. Corp. v. Tide Guarantee & Trust Co.*, 271 N.Y. 124, 2 N.E.2d 284 (1936) (refund of purchase price denied in an action at law because no tender made prior to suit).

²¹⁷ *E.g.*, *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (accountants held liable for negligent certification of balance sheet).

²¹⁸ See, e.g., *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928).

plaintiff examined the goods,²¹⁹ the plaintiff did not rely on the statement alone,²²⁰ or the plaintiff suffered no pecuniary damages.²²¹ Occasionally what might be properly considered an implied warranty may be found sufficient.²²² If the manufacturer was aware of certain safety-related defects in an entire line of vehicles, the consumer may claim there was a misleading nondisclosure. Since a defendant may reasonably be taken to represent that some things are true merely by entering into a transaction,²²³ the consumer could even argue that by selling a new vehicle the dealer or manufacturer represents it to be free of defects, since generally such warranty accompanies a sale.

Before the consumer can recover, he must satisfy the court that he is not attempting to be relieved of a bad bargain. This is done through the requirement of materiality. In order for a misrepresentation to be material, the difference between the facts as they are and the facts as they were represented to be must be of such a character as likely to influence an ordinary person. If it is the kind of misstatement to which no reasonable person would attach any significance, then a claimant will not be afforded relief simply because of his statement that he relied thereon.²²⁴ Thus it is important to first determine what an ordinary person expects when he purchases a new motor vehicle or equipment. Inasmuch as purchasers in the past have never expected vehicles to be free of defects and have not voluntarily elected to purchase all equipment which might lead to safer driving, a court could easily find that the purchaser received substantially what he bargained for and that restitution is not proper. Some courts probably found a representation not of sufficient materiality after weighing the plaintiff's comparatively small loss against the large amount involved in the

²¹⁹ See, e.g., *Foote v. Wilson*, 104 Kan. 191, 178 P. 430 (1919) (farmer examined store and contents before purchase).

²²⁰ See e.g., *Alder v. Yager*, 215 Ky. 678, 286 S.W. 983 (1926) (inspection of coal mine prior to exchange for a farm).

²²¹ See, e.g., *Edward Thompson Co. v. Schroeder*, 131 Minn. 125, 154 N.W. 792 (1915) (lawyer bought law books relying on statement that same books were not sold to others in same town).

²²² See, e.g., *Smith v. Zimbalist*, 2 Cal. App. 2d 324, 38 P.2d 170 (1934) (description of violin in bill of sale amounted to an implied warranty of genuineness).

²²³ See, e.g., that a bank receiving deposits is solvent, *Cassidy v. Uhlmann*, 170 N.Y. 505, 63 N.E. 554 (1902); or that a stock certificate is valid, *Pennbaker v. Kimble*, 126 Ore. 317, 269 P. 981 (1928).

²²⁴ See Keeton, *Actionable Misrepresentation: Legal Fault as a Requirement. II Rescission*, 2 OKL. L. REV. 56, 61 (1949).

transaction.²²⁵

4. Consumers Should Have Remedies Under the Safety Act

The foregoing discussion of the problems facing the consumer who seeks a remedy for the manufacturer's noncompliance with the Safety Act makes it apparent that the consumer does not have adequate relief available under state law. Yet Congress' failure to extend to the consumer at least some of the rights granted under the Act to dealers and distributors was not an oversight.²²⁶ Possibly Congress was simply reluctant to extend federal jurisdiction into an area dominated by state law. But federal courts are already available in diversity cases involving claims in excess of 10,000 dollars,²²⁷ whether or not state courts can provide adequate relief.

Several things could have been achieved by providing specific relief for the consumer under the Act. First, by stating that the manufacturer or dealer must deliver to the consumer a vehicle or equipment complying with appropriate federal safety standards and free of safety-related defects or repurchase the vehicle or equipment or repair or replace it free of cost to the purchaser, a higher standard of duty toward the purchaser would have been established, which standard could be used by courts in cases involving conflicting warranties or disputes regarding repairs. Second, by providing that in case of noncompliance by the manufacturer or dealer the consumer may proceed with an action in the United States district court, without reference to the amount involved, and recover the amount of his loss plus court costs and reasonable attorney fees, Congress would have been assured (1) that worthwhile claims are not denied litigation simply because of lack of money for attorney fees, and (2) that out of any recovery there is sufficient money left to actually provide for any necessary vehicle or equipment repairs or replacement. This would foster the purpose of the Safety Act by assuring that the consumer acquires a reasonably safe vehicle or equipment. There is no reason why the usual tort actions, such as negligence or strict liability, would not be

²²⁵ See, e.g., *La Bar v. Lindstrom*, 158 Minn. 453, 197 N.W. 756 (1924) (\$17,000 contract not rescinded where \$275 could correct roof defect); *but cf.* *Dubovy v. Woolf*, 127 Me. 269, 143 A. 58 (1928) (\$7,500 contract for purchase of a house rescinded because of \$50 worth of defects).

²²⁶ A suggested amendment providing for corrective recalls was not included in the bill. 112 CONG. REC. 18792 (daily ed. Aug. 17, 1966). Also the point was made that the act preserved all common law remedies existing against a manufacturer for the benefit of a purchaser. See 112 CONG. REC. 18807 (daily ed. Aug. 17, 1966).

²²⁷ 28 U.S.C. § 1332 (1964).

tried in state courts as at present. Since in such cases the attorney usually undertakes to represent the plaintiff on a contingent fee basis, calling for one-third or one-half of the amount recovered, any award of a "reasonable attorney fee," probably would only cover a part of the fee and would not by itself induce suit in a federal court.

C. Effect of Safety Act Upon Negligence Actions

Thus far nothing has been said concerning the effect of the Safety Act on negligence actions, which have as their purpose the restoration of the injured person after an accident has happened.²²⁸ Emphasis has been on how to prevent such actions, because obviously if a defectively designed or manufactured vehicle can be returned to the manufacturer or repaired a possible accident can be averted and a negligence action against the manufacturer avoided. Courts have treated the presence of a safety act in different ways. Violation of such a statute has been held to be negligence per se²²⁹ or as establishing a standard which may or may not be accepted in a particular case.²³⁰ There is good argument for finding some violation of the Safety Act, *e.g.*, noncompliance with federal safety standards, as negligence per se because the purpose of the Act is to protect the public against unreasonable risk of accidents occurring as a result of design, construction or performance of motor vehicles or equipment and against un-

²²⁸ See O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299, 312 (1963).

²²⁹ *E.g.*, *Bolitho v. Safeway Stores*, 109 Mont. 213, 95 P.2d 443 (1939) (pure food acts construed to make the sale of defective goods for consumption negligence per se); *Schell v. DuBois*, 94 Ohio St. 93, 113 N.E. 664 (1916) (violation of a traffic ordinance held negligence per se); *Turner v. Wilson*, 227 S.C. 95, 86 S.E.2d 867 (1955).

²³⁰ See, *e.g.*, *Phoenix Refining Co. v. Powell*, 251 S.W.2d 892 (Tex. 1952) (penal provision prescribing an appropriate standard for measuring civil liability need not be given effect as fixing civil liability; party violating the statute may raise an issue as to an excusable violation); *Satterlee v. Orange Glenn School District*, 29 Cal. 2d 581, 177 P.2d 279 (1947) (violation of a traffic ordinance raised a rebuttable presumption of negligence. Concurring opinion argued that if the statutory standard is applicable at all, the conduct of the parties must be measured by that standard and jury is not free to determine what a reasonably prudent man would have done under the circumstances). James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 106-14 (1950), discusses whether a violation of a statute should be held negligence per se in a civil action. He criticizes the widely accepted rationalization that a civil action cannot be regarded as one upon the statute where the statute gives no civil remedy but that any recovery for breach of the statute must be worked out on common law principles of negligence, which involve the standard of reasonably prudent conduct which is usually for the jury to decide upon.

reasonable risk of death or injury to persons in the event accidents occur. Certainly any owner, driver, occupant of a vehicle, or even a pedestrian coming in contact with a vehicle, belongs to the class of persons whose interests were sought to be protected by the legislation. In the case of an accident attributable to the manufacturer's noncompliance with some federal motor vehicle or equipment safety standard, these persons have an interest invaded by the manufacturer's misconduct, which interest was of the type that the legislature sought to safeguard. It would be sufficient for the plaintiff to show that the noncompliance was the proximate cause of the injury, unless the court found the defendant's action was not the proximate cause because of some third party's intervening act or another intervening force.²³¹

While a manufacturer's liability to those foreseeably endangered by his negligently manufactured product has been long established,²³² courts have been more hesitant in holding the manufacturer liable for negligent design.²³³ This has been due to a reluctance to allow juries or lay persons to pass judgment on the work of experts and to fear that finding negligent design will result in many additional claims and require extensive remodeling of a product or its removal from the market.²³⁴ The passage of the National Traffic and Motor Vehicle Safety Act of 1966 should indicate to courts that the social policy of the country in regard to motor

²³¹ See Comment, *Liability for Negligent Automobile Design*, 1967 IOWA L. REV. 953, 966-68 for the requisite elements in establishing negligence per se. See also Johnson, *Effect of Traffic and Motor Vehicle Safety as Applied to Tires*, 34 INS. COUNSEL J. 261, 265 (1967), who speculates on whether the Safety Act may not be interpreted in the same way as the Safety Appliance Act, 49 U.S.C. § 1201-203 (1964), which has been held to impose absolute liability upon a railroad for any failure to maintain or equip its trains with that specified apparatus designated in the Act, without the necessity of showing negligence or even knowledge of the violation or noncompliance. See *Clark v. Atlantic Coast Line R.R.*, 244 F.2d 368, 373 (D.C.C. 1957) (obvious purpose of the Safety Appliance Act is to induce carriers to adhere to higher standards in their operations by imposing a liability on interstate carriers if they do not comply with the act).

²³² See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

²³³ An exception to this has been occasional cases involving breach of express warranty where the equities strongly favored the injured plaintiff who had purchased an automobile in reliance on a false assurance as to the qualities of the product. See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), *aff'd after retrial*, 179 Wash. 123, 35 P.2d 1090 (1934); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956).

²³⁴ See Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

vehicle and equipment design is changing, with present emphasis on safety.²³⁵ Inasmuch as the Act provides only for minimum standards,²³⁶ there is no reason why a court should not impose a greater duty on the manufacturer for improving the design and performance of his vehicle or equipment where he is aware of a potential safety problem and has the requisite engineering knowhow and ability to correct it at a reasonable cost. It has been suggested that where the original design is clearly defective the manufacturer should have the duty to take any reasonable steps, including the supplying of an easily attachable safety device to products already sold.²³⁷ If this reasoning were applied to the instances involving safety-related defects that are sufficiently important to call for notification under the Safety Act, the manufacturer would be required to either provide means for repairing the defects or be responsible for resulting injuries.

VI. CONCLUSION

In conclusion, the National Traffic and Motor Vehicle Safety Act of 1966 required the creation of federal safety standards governing certain aspects of motor vehicles and motor vehicle equipment. Since the standards are of a minimum nature, any major safety improvements will probably be the result of voluntary efforts by the automobile industry. In fact, the implementation of the entire Act, from the setting and adopting of standards to providing a consumer with a reasonably safe vehicle or equipment incorporating all applicable safety standards, depends greatly on the voluntary cooperation of the automotive industry. The industry's future actions are especially important in the consumer area. As previously discussed, the consumer's remedies are quite inadequate. Yet by voluntarily designing and manufacturing safer and better vehicles and equipment, providing for recalls and repairs whenever necessary, and liberalizing their warranty provisions, the manufacturers could make further legislation unnecessary.

Velta A. Melnbrencis

²³⁵ Manufacturers' protection from tort liability for their defective products by privity restrictions, notice requirements, defense of contributory negligence as well as reluctance of many courts to submit design negligence cases to juries reflects a policy of the law which was necessary during the development of our free enterprise economy but the need for which has passed. See Philo, *Automobile Products Liability Litigation*, 4 DUQ. L. REV. 181, 182 (1966).

²³⁶ 15 U.S.C. § 1381 (1964).

²³⁷ See Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 818 (1962).